UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

GELOCK TRANSFER LINE, INC. and HASTINGS TRUCK COMPANY, INC., A Single Employer

Case No. 7–CA–46867

And

LOCAL 324, A, B, C & D, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO

Donna Nixon, Esq., for the General Counsel.
Peter J. Kok and Nathan D. Plantinga, Esqs.
(Miller, Johnson, Snell & Cummiskey, P.L.C.)
Grand Rapids, Michigan, for the Respondent.

DECISION

Statement of the Case

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Grand Rapids, Michigan on May 12 and 13, 2004. The charge was filed November 19, 2003 and the complaint was issued January 28, 2004.

Respondent Gelock Transfer Line and Hastings Truck Company operate from the same facility in Grand Rapids, Michigan. Gelock moves and installs heavy industrial machinery and equipment; Hastings moves this equipment over the public highways. For purposes of this proceeding, Respondent concedes that Gelock and Hastings are a single employer.

On April 28, 2003, Local 324, A, B, C and D of the International Union of Operating Engineers was certified as the exclusive bargaining representative of the following unit of Gelock/Hastings employees:

> All full-time and regular part-time equipment operators, mechanics and truck drivers…but excluding dispatchers, estimators, office clerical employees, salespeople, all other employees currently represented by a labor organization, guards and supervisors as defined in the Act.

Among the employees excluded from the unit are Gelock's Ironworkers who are represented by Local 340 of the International Association of Ironworkers.

The General Counsel alleges that Respondent violated Section 8(a)(5) and (1) of the Act in making changes in the wages, hours and other terms and conditions of employment of bargaining unit employees without prior notice to the Union and without affording it an opportunity to bargain over these changes. The alleged unilateral changes are 1) ceasing its practice of regularly assigning yard work to unit employees; 2) altering its practice of assigning work to subcontractors only when unit members are unavailable and 3) altering its group health insurance plan from a point of service plan to a health maintenance organization (HMO) plan.

The General Counsel also alleges that Respondent violated Section 8(a)(1) of the Act, through Estimator Todd Walker, by threatening employees with discharge because they had selected the Union as their collective bargaining representative.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

Findings of Fact

Alleged unilateral change: decline of bargaining unit yard work

The General Counsel alleges that since about June 2, 2003, Respondent ceased its practice of regularly assigning yard work to unit employees. This is work performed at Respondent's storage yard such as cleaning, maintaining and putting equipment away that is generally not billed to customers and apparently has been used to allow employees to work an 8-hour day when their billable work is completed.

At trial, the General Counsel's evidence consisted of the impressionistic testimony of employees David Dosier, Jeff Miller and Jeffrey "Deen" Haring. Their testimony is that yard work previously performed by bargaining unit members has been done by the unionized ironworkers since late summer/early fall of 2003. Respondent, on the other hand, introduced two charts, R. Exhibits 3 and 4, purporting to show that unit employees had more yard work in the months after June 2, 2003 than they did in the comparable period before June 2.

Over the objection of the General Counsel I received these exhibits as summaries pursuant to Rule 1006 of the Federal Rules of Evidence. However, I gave the General Counsel leave to offer into evidence the records underlying these exhibits with her brief and she has done so. I therefore receive this exhibit as General Counsel's Exhibit 19 (a) – (l).

The General Counsel's arguments and conclusions drawn from GC Exhibit 19 are very different than the violation alleged in paragraph 11 of the Complaint. The General Counsel concedes that unit members actually performed more yard work between June and December 2003 than they did between February 2003 and May 2003. According to the General Counsel at page 15 of her brief, unit members received 235.75 hours of yard work from February through May and 404 hours from June to December. However, the General Counsel alleges that there is a violation of Section 8(a)(5) because the unionized ironworkers performed a much greater amount of the yard work after June 2 than they had from February through May. This is true both in absolute terms and relative to the operating engineer's unit employees. Ironworkers performed 39.5 hours or 14.35% of the yard work from February through May, compared with 368 hours of yard work or 47.68%, from June to December.

Nevertheless, the record establishes that Respondent did not cease its practice of regularly assigning yard work to employees in the operating engineer's unit—the violation alleged in the Complaint. I decline to consider the alternate theory first posed by the General Counsel in its brief, i.e., that Respondent violated Section 8(a)(5) by assigning the ironworkers yard work that had been assigned to the unit employees prior to June 2, 2003. The General Counsel did not place Respondent on notice before or during the hearing that it had to defend its conduct pursuant to such a theory. Thus, I find that this theory was not fully and fairly litigated, *Cibao Meat Products,* 338 NLRB No. 134 n. 13 (2003). Therefore, I dismiss Complaint paragraph 11.

Alleged Unilateral Change: Increased use of subcontractors for bargaining unit work

The General Counsel also alleges that since about September 26, 2003, Respondent changed its practice of assigning unit work to subcontractors only when unit employees were unavailable. In attempting to establish Respondent's past practice, the General Counsel relies on the testimony of unit member David Dosier. Dosier testified that five or more years ago, Randy Van Dam, Respondent's President, told Dosier that "the company trucks will go first…"(Tr. 46-47). The General Counsel notes in its brief that Randy Van Dam did not testify at trial and that therefore Dosier's testimony in this regard is uncontradicted. However, Respondent argues this testimony does not establish the alleged violation because in an affidavit given to the Board on December 4, 2003, Dosier stated, "…only if all of the Gelock-Hastings employees' equipment was tied up would [they] call in Dunkel, but that all changed about a year ago (Tr. 71-72)." Thus, I agree with Respondent that Dosier's testimony does not establish that there was any change in Respondent's subcontracting policies after the Union's certification.

Respondent has subcontracted work to Dunkel and other subcontractors for many years. Richard Van Dam, Respondent's General Manager (Randy's brother), denies that it ever had a policy or practice that limited its use of subcontractors to occasions when all its employees were busy. The General Counsel's witness, Jeff Miller, conceded that there were occasions prior to 2003 when Respondent subcontracted work to James Dunkel at times when Respondent's employees were not working (Tr. 117). Thus, I find that the record does not establish the past practice from which Respondent allegedly departed on or about September 26, 2003.

The General Counsel's witnesses testified to several occasions on which subcontractor James Dunkel and his employees were working when Respondent's bargaining unit employees were not. Richard Van Dam testified that trucking assignments depend on the type of equipment needed. Some jobs in which use of a 3-axle vehicle is desirable are subcontracted, others are assigned to unit members Allen and Dosier. He stated further that Respondent has always used James Dunkel to operate one of its cranes, depending on the nature of the job. He gave no specifics as to the considerations that might lead Respondent to have Dunkel, as opposed to one of Gelock's employees, operate one of its trucks or cranes.

It is the General Counsel's burden to establish Respondent's past practice and how it changed after the certification of the Union. The General Counsel has failed to do this. It is unclear what Respondent's practice was with regard to subcontracting to Dunkel prior to the certification of the Union—both with regard to the use of his trucks and drivers and with regard to using Dunkel or his employees to operate a crane. Due to this failure of proof, I dismiss the allegation.

Alleged Unilateral Change regarding health insurance

Respondent and the Union discussed the issue of health insurance in either one or both of the two collective bargaining sessions held prior to November 2003. The Union wanted Respondent to adopt its health insurance plan. Respondent requested information relating to the financial status of the union's health plan that it apparently has yet to receive.

Respondent's health insurance policy for the period December 1, 2002 to November 30, 2003 enrolled unit members in the Priority Health Point of Service Plan. Under this plan, Respondent paid 85% of employees' health insurance premiums and the employees paid 15%. In the summer of 2003, Respondent began considering different options for the plan year beginning December 1, 2003. Gelock's insurance consultant advised Respondent that

premiums for the point of service plan would increase 18% for the next year. The consultant advised that Priority Health's health maintenance organization (HMO) would entail a premium increase of 10%. At no time did Respondent notify the Union that it was considering any changes to its health insurance program.

In a letter dated November 3, 2003, but mailed several days later, Respondent notified its employees (other than the ironworkers, who are covered by their union's health insurance plan), that they would be enrolled in the Priority HMO effective December 1, 2003.

The letter stated that there were two differences between the Priority Point of Service plan and the HMO:

1. You will no longer have Out-of-Network benefits. The only benefits covered are those from which you receive from your Primary Care Physician, or those in which your Primary Care Physician refers you.
2. There are no longer Chiropractic benefits (these were covered at the out-of-network benefit level).

Respondent did not notify the Union of this change. Unit member David Dosier informed Union President John Cobe of this change sometime between November 6 and November 19, 2003. Cobe made no attempt to contact Respondent regarding this change. Instead he filed an unfair labor practice charge on November 19, 2003.

Analysis

Generally, when parties are engaged in negotiations for a collective bargaining agreement, an employer's obligation to refrain from unilateral changes in the wages, hours and other terms and conditions of employment of bargaining unit employees extends beyond the duty to provide notice to the Union and an opportunity to bargain about a subject matter. It encompasses a duty to refrain from implementing such changes at all, absent overall impasse on bargaining for the agreement as a whole, *Bottom Line Enterprises,* 302 NLRB 373 (1991). There are exceptions to this general rule. When a union engages in tactics designed to delay bargaining or when economic exigencies compel prompt action, an employer may be entitled to implement such unilateral changes. However, even when "economic exigencies compelling prompt action" justify unilateral changes, the employer must provide the union adequate notice and an opportunity to bargain, *RBE Electronics of S.D.,* 320 NLRB 80, 82 (1995).

Another exception to the rule is set forth in *Stone Container Corp.,* 313 NLRB 336 (1993). Thus, where as in the instant case, an employer annually reviews and adjusts the costs and benefits of its health insurance plan, it does not have to wait until impasse to implement changes to its plan; however, it must provide the Union with timely notice and a meaningful opportunity to bargain over the change, *Brannen Sand & Gravel Co.,* 314 NLRB 282 (1994).

Changes in employee health insurance are a mandatory subject of bargaining, *Nabors Alaska Drilling, Inc.,* 341 NLRB No. 84 (April 21, 2004). However, a unilateral change must be "substantial and material" to violate section 8(a)(5), *Mitchellace, Inc.,* 321 NLRB 191, 193 and n. 6 (1996). Respondent argues that the change from the Priority Health Point of Service Plan to the Priority HMO did not violate the Act because it was not a substantial and material change. I conclude otherwise. Whereas employees were able to pay somewhat more out of pocket to see physicians outside of the Priority physicians network under the point of service plan, they receive no insurance benefit if they were to visit an out of network physician under the HMO. Moreover, employees lost their ability to seek chiropractic care without a referral by a primary

care physician. The materiality of the change is evidenced by the fact that a number of employees, including estimator Todd Walker, understood the change in their health insurance to be significant and were upset by it.

Respondent could not, pursuant to Section 8(a)(5), implement this material change without providing the Union timely notice of the proposed change and an opportunity to bargain with respect to it. The only remaining question is whether the Union waived its bargaining rights by failing to contact Respondent when it learned of the switch to the Priority HMO. I conclude that it did not waive its rights because Respondent presented the change as a *fait accompli.*

The Board reached a similar conclusion in a very similar context in *Brannen Sand & Gravel Co., supra*. There the Employer, during collective bargaining negotiations, in which health insurance benefits were a subject of discussion, conducted its annual review of its health insurance plan—without notifying the union. One month before implementing changes in the health plan, the employer notified employees of the change—again without notifying the Union. A copy of the memo implementing the change was faxed to the Union six days later (three weeks before implementation). The Board found that the Union did not waive its right to bargain over the change for two reasons, both of which are applicable to the instant case. First of all, where the parties are involved in collective bargaining negotiations, a union does not have to request additional bargaining to preserve its rights—unless it has explicitly relinquished its right to bargain on a matter.

Secondly, Respondent notified employees that the change would be effective within a few weeks--before the Union learned of the changes. As in *Brannen,* I find that by so notifying unit employees of the change, Respondent indicated its intent to implement the changes without bargaining with the Union and therefore presented it with a *fait accompli*.[1] Thus, I find that the Union did not waive its bargaining rights by not contacting Respondent. Moreover, by filing an unfair labor practice charge upon learning of the change, eleven days before implementation, the Union in effect renewed its request to bargain, *Sewanee Coal Operators Assn.,* 167 NLRB 172, n. 3 (1967); *Roberts Electric Co.,* 227 NLRB 1312, 1319 (1977). Thus, I find that Respondent violated Section 8(a)(5) and (1) as alleged in paragraph 13 of the Complaint.

The Alleged Section 8(a)(1) threat

Shortly after Respondent notified employees of the change in their health insurance, David Dosier discussed the change with Todd Walker, who is an estimator for Respondent. Neither was happy about the change. Dosier questioned whether Respondent could make such a change without notifying the Union and offering it an opportunity to bargain. According to Dosier, Walker said, “if you want to be union, I guess you will be working someplace else.”

[1] In *Brannen* there was an additional factor in the Board’s conclusion that the employer had presented the union with a *fait accompli.* At a bargaining session 16 days after the implementation of the change in health insurance, the employer’s representative told the union’s bargaining representative that it would have discussed the changes with the union before implementation but that such discussion would have been fruitless. Nevertheless, I find *Brannen* to be controlling in the instant case. The essence of the decision is that when an employer announces a planned unilateral change to unit members shortly before implementation and fails to notify their collectively bargaining representative, it presents the union with a *fait accompli* and the union does not waive its bargaining rights if does not respond.

Walker testified that he doesn't recall saying any such thing or discussing the change in health insurance with Dosier. However, he does recall that "we were all upset about the HMO." Normally, I would credit Dosier in view of corroborating testimony by Jeffrey Miller and Walker's failure to deny that he made such a remark. However, there are a number of unsettling things about the record regarding this allegation that lead me to dismiss it. First of all, the remark doesn't make a lot of sense given Respondent's relationship with the ironworkers' union, the fact that the Union had already been certified, or the context in which it was allegedly made. Walker was sympathetic with Dosier's view of the health insurance change; there appears to be no reason for him to make a threat.

Finally, the charge filed on November 19 alleged that this remark was made on October 8, almost a month before employees were apprised of the forthcoming change in their health insurance. Thus, if the charge is accurate, the remark could not have been made in the context of a discussion concerning the change to an HMO. Despite Walker's failure to directly contradict the testimony of Dosier and Jeffrey Miller on this point, I find the General Counsel's evidence to be insufficiently credible to sustain a violation.

Summary of Conclusions of Law

1. Respondent violated Section 8(a)(5) and (1) as alleged in paragraph 13 of the Complaint by unilaterally changing its health insurance plan from a point of service plan to an HMO plan without providing the Union with adequate notice and an opportunity to bargain over the change.

2. Respondent did not violate the Act as alleged in paragraphs 11 and 12 by ceasing its practice of regularly assigning yard work to unit employees or altering its practice of assigning work to subcontractors.

3. Respondent, through Todd Walker, did not threaten employees with discharge because they had selected the Union as their collective bargaining representative.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondent, Gelock Transfer Line, Inc. and Hastings Truck Company, Grand Rapids, Michigan, its officers, agents, successors, and assigns, shall

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

1. Cease and desist from

(a) Making unilateral changes in the terms and working conditions of bargaining unit members without providing their collective bargaining representative notice of any such proposed changes and an adequate opportunity to bargain with respect to such proposed changes.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Upon request of the Union, restore the status quo regarding unit members' health insurance.

(b) Make unit members whole for any economic loss resulting from Respondent's unilateral change in health insurance, together with interest calculated in accordance with NLRB policy.

(c) Upon request, bargain in good faith with the Union in regard to wages, hours and other terms and conditions of employment of unit members.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Grand Rapids, Michigan facility copies of the attached Notice marked "Appendix."[3] Copies of the Notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where Notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the Notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the Notice to all current employees and former employees employed by the Respondent at any time since November 3, 2003.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., July 26, 2004.

_____
Arthur J. Amchan
Administrative Law Judge

APPENDIX

NOTICE TO MEMBERS AND EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain on your behalf with your employer
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT make unilateral changes to the wages, hours and other terms and conditions of employment of employees in following bargaining unit without giving to Local 324, A, B, C & D, International Union of Operating Engineers, AFL-CIO, adequate notice and an adequate opportunity to bargain about any such proposed changes:

> All full-time and regular part-time equipment operators, mechanics, and truck drivers employed by Respondent at or out of its facility located at 550 Market Street S.W., Grand Rapids, Michigan; but excluding dispatchers, estimators, office clerical employees, salespeople, all other employees currently represented by another labor organization, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit.

WE WILL, if requested by the Union, restore the status quo with regard to unit members' health insurance coverage.

WE WILL make employees whole for any economic loss due to our unilateral change in health insurance coverage in the event we restore the status quo at the Union's request.

GELOCK TRANSFER LINE, INC.
and HASTINGS TRUCK COMPANY, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

477 Michigan Avenue, Federal Building, Room 300, Detroit, MI 48226-2569

(313) 226-3200, Hours: 8:15 a.m. to 4:45 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (313) 226-3244.